No. 89-782 (5)

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

FREDERICK SMITH, in his individual and official capacity as Principal of Bradford Area High School, RICHARD MILLER, in his individual and official capacity as Assistant Principal of the Bradford High School; and FREDERICK SHUEY, in his individual and official capacity as Superintendent of the Bradford Area School District.

Petitioners

v.

JUDY GROVE SOWERS

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF AMICI CURIAE OF THE NATIONAL SCHOOL BOARDS ASSOCIATION AND THE NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

GWENDOLYN H. GREGORY, Deputy General Counsel
Counsel of Record
National School Boards Association
1680 Duke Street, Alexandria, VA 22314
(703) 838-6712

AUGUST W. STEINHILBER, NSBA General Counsel

THOMAS A. SHANNON, NSBA Executive Director

IVAN GLUCKMAN, General Counsel
National Association of Secondary School Principals
1904 Assoc. Drive, Reston, VA 22901
(703) 860-0200

35pp

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Counsel for both parties have consented to the timely filing of this brief. The consents will be submitted to the clerk as soon as they are received.

QUESTIONS PRESENTED

1. Are school students "at liberty" during summer vacation so that, under the rationale of this Court in DeShaney v. Winnebago there exists no duty under the Fourteenth Amendment for school administrators to protect them from criminal assaults?

2. Was there clearly established law in 1979 that school administrators had a duty under the Fourteenth Amendment to protect school students from criminal assaults?

3. Can this Court's holding in City of Canton v. Harris that municipal bodies may be held accountable for a policy amounting to "deliberate indifference" to

the rights of citizens be extended to create a new theory of personal liability for municipal officials?

INTEREST OF AMICI

Amicus curiae, National School Boards Association (NSBA), is a nonprofit federation of this nation's forty-nine state school boards associations, the Hawaii State Board of Education, the District of Columbia school board and the U.S. Virgin Islands. Established in 1940, NSBA is the only major national educational organization representing 15,300 school boards and their 97,000 members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

The individuals who compose this nation's school boards are elected (97%) or appointed community representatives,

most of whom are not professional educators. They are responsible under state law for the fiscal management, staffing, continuity, and educational standards of the public schools.

The principles established by the lower court, if left standing, could significantly expand liability of local school boards for alleged negligence of school personnel in failing to protect students. The lower court has established a federal tort standard which imposes liability on public entities for "negligence" even though it is problematic as to whether general theories of causation under common law principles of negligence law would impose liability. Given the perceived "deep pockets" of school districts, plaintiffs would seek damages in federal courts, under 42 U.S.C. section 1983, for

injuries to students inflicted by the actual perpetrators, who are "judgment proof."

Amicus curiae National Association of Secondary School Principals (NASSP) is a voluntary association of approximately 42,000 administrators of public and private secondary schools throughout the United States. NASSP was organized in 1916 to provide a spokesman for secondary school administrators in the formulation of all aspects of educational policy in the United States and to improve programs for students enrolled in these schools.

NASSP is committed to the improvement and strengthening of secondary education. It seeks to be responsive to changes both in the school environment and in the role of education in society. It promotes research and development in curriculum standards and

course content. It seeks to develop higher standards and qualifications for secondary school administration through professional intern and improvement programs. It seeks to focus attention on national educational problems by providing leadership services to its members and information to the general public. NASSP is organized exclusively for educational and charitable purposes.

Although NASSP does not customarily seek to intervene in litigation, it believes that this case involves issues of such fundamental public importance as to make an expression of its views essential. NASSP believes that it is critical to the efficient conduct of public education and maintenance of public confidence and support in public schools that school administrators be free to exercise their professional

judgment on behalf of students and teachers alike without subjecting themselves and their employing boards to potential liability in federal court for any and all injury which a student may suffer as the result of the criminal acts of another member of the school community. In short, neither the board nor its administrators should be made the insuror of student well-being, under strained interpretations of civil rights law.

STATEMENT OF THE CASE

Amici incorporate by reference thereto the statement of the case contained in brief of Petitioners.

ARGUMENT

I. Summary of Argument

The court of appeals erred in its first decision in holding that there is a "special relationship" between schools

and their students giving rise to a duty to protect the students from criminal action of others. The court compounded its error by holding, in its second decision, that the school district and its administrators can be held liable under either of two theories established by the court, even in absence of a "special relationship." Under the first theory, the court ruled that a school district can be held liable for its "reckless indifference" in allegedly failing to make clear to the band director that criminal assaults are not permitted. Under the court's second theory, the district can be held liable for its failure to train its employees to deal with allegations of child abuse.

Since both theories as propounded by the Supreme Court are predicated on the existence of a "special relationship"

between the parties, there is no liability under either theory unless the court makes the determination on "special relationship." Although the court purports to avoid ruling on the issue in DeShaney v. Winnebago County Department of Social Services, 109 S.Ct. 998 (1989), it has not done so. The issue was addressed implicitly, and undoubtedly, the trial court will merely assume the existence of the relationship and go on to instruct on duty to train and reckless disregard. This does not seem to be an appropriate way to rehear the case "in light of DeShaney."

The court erred in interpreting Supreme Court precedent to hold that Respondent has a fundamental right to be free from bodily injury. This Court has ruled only that there is a liberty interest in bodily integrity, for

procedural due process purposes only. The Court has not ruled on the substantive due process issue.

School districts across the country are in need of an answer from this Court as to the scope of the so-called "Constitutional tort." This question cries out for resolution. School districts are being held liable in lawsuits brought under the Constitution for actions and inactions which are nothing more than common law torts.

II. The lower court erred in failing to expressly rule on the issue of "special relationship" because its "alternative" grounds must be predicated on a finding that a "special relationship" exists.

On remand of this case, this Court directed the court of appeals to reconsider its decision in light of DeShaney v. Winnebago County Department

of Social Services, supra. Instead of taking on the issue of whether the DeShaney precedent applies in a case involving a public employee, the court decided the case on other grounds, it says are "unrelated to the issue decided in DeShaney." Amici contend that the grounds are not in actuality independent from the DeShaney issue and that the court of appeals did by implication that which it refused to do expressly.

The court bases its new opinion on a determination that the school officials acted in "reckless indifference" to the abuse of students by teachers to the extent of implicitly encouraging continued abuse. The court further holds that constitutional rights were infringed by the district's failure to institute policies and practices to assure adequate training of employees to handle

complaints of abuse. The court of appeals declared that these are bases of liability that were left undisturbed by DeShaney.

The court of appeals' analysis, however, confuses standards of municipal liability with constitutional obligations. Petitioners cannot be held liable in this case without first finding that a "special relationship" exists between the school district and the students, sufficient to give rise to a constitutional duty to protect students from bodily harm. There is no independent fundamental right to be free from "reckless" or "deliberate indifference" of the state, whether arising out of "inadequate training" or otherwise.

If there is no predicate "special relationship" the concept of "reckless

indifference" as a basis for liability does not attach. The "deliberate indifference" standard for establishing liability was developed in the context of the eighth amendment in prison cases where there is a "special relationship" between the state and the plaintiff. Estelle v. Gamble, 429 U.S. 97 (1976) first set forth the standard. That case involved a prisoner who allegedly was not provided adequate medical attention while in prison. The Court held that the eighth amendment's proscription against cruel and unusual punishment includes the right to medical care for those whom the state is punishing by incarceration.

Estelle was decided under the eighth amendment, which is not applicable to the schools. Ingraham v. Wright, 430 U.S. 651 (1977). If the Estelle precedent is to be extended to schools, there must be

a showing of some kind of "special relationship" that would be analogous to that between the state and prisoners.

As another independent rationale for its ruling the lower court cites City of Canton v. Harris, 109 S.Ct. 1197 (1989), for the proposition that the injuries of the Respondent were caused by the school district's failure to train its employees. In Canton, the plaintiff allegedly suffered damage because the prison official failed to recognize the seriousness of her physical condition. Plaintiff alleged that the guard was improperly trained. This Court held that failure to train is an independent cause of action "only where failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. (Emphasis supplied.)" Canton, 109 S.Ct at 1204. The

constitutional "right" to which the policy were allegedly deliberately indifferent in Canton was the right to medical treatment, established in Estelle v. Gamble, supra. As noted above, this right to medical treatment derives from the protections afforded by the eighth amendment, which this Court has held does not apply to the schools. Thus, in order for a special relationship to exist between the schools and their students there must be some constitutional right, other than the eighth amendment, to which it can be attached. That nexus has not been drawn here.

Although the court of appeals disavowed any reliance on a duty to protect analysis, its reasoning contained an implicit finding that a "special relationship" exists between the school district and its employees and the

Respondent. Yet the lower court expressly refused to analyze this Court's decision in DeShaney in light of the facts in this case. At the least, this Court should remand the case for an express ruling on that question.

Although Amici believe that the lower court erred in its first decision, wherein the court held that there is a special relationship between the schools and the students giving rise to a duty to protect, the court's newest opinion in effect is based on the same premise but without the rationale to back it up.

III. The lower court erred in holding that there is an established fundamental right to be free from bodily harm.

The court begs the question of whether there exists a constitutional duty to protect students by its analysis of the constitutional right to be free

from bodily injury. Despite the appeals court's proclamations to the contrary, it is not "clearly established" that the right to be free from bodily harm is a "fundamental right" protected through a substantive due process analysis. It is a liberty interest protected by procedural due process, but this Court is yet to rule on the question of whether there is a fundamental substantive right to bodily integrity in the context of the public schools.

This Court in Ingraham v. Wright, 430 U.S. 651 (1977), held that the eighth amendment's proscription against cruel and unusual punishment does not apply to school corporal punishment. However, the court agreed that the student had a liberty interest in personal security which is protected through procedural due process. The Court held that procedural

due process was satisfied by Florida's statute which prohibits excessive force in administering corporal punishment.

The Court held that, although "corporal punishment in public schools implicates a constitutionally protected liberty interest . . . the traditional common-law remedies are fully adequate to afford due process." Id. at 672.

The Petitioners in Ingraham also claimed a violation of substantive due process: "Is the infliction of severe corporal punishment upon public school students arbitrary, capricious and unrelated to achieving any legitimate educational purpose and therefore violative of the Due Process Clause of the Fourteenth Amendment?" The Court expressly refused to address that question. 430 U.S. at 658 n.12, 679 n.47. Thus, citations to Ingraham in

support of the lower court's holding that there is a substantive due process right to "freedom from bodily harm" are inapposite.

There may be a substantive right to be free from bodily harm which is penumbral to express constitutional rights, but none of those rights are implicated here. For example, the eighth amendment protects those in the criminal system from "cruel and unusual punishment" which would include freedom from bodily harm. That amendment does not apply to schools. Other prisoner's rights would include a freedom from bodily harm component, e.g. the fifth amendment right relating to self incrimination and the sixth amendment right to counsel, but those rights also do not apply here. Thus, the court of appeals erred in holding that the

students had a clearly established constitutional right to be free from bodily harm of which the school officials should have been aware.

IV. School districts need guidance from this Court as to the scope of their constitutional duty, if any, to protect students from harm.

However heinous the conduct of the band director in this case, the conduct was certainly not condoned by the school district nor did it further any school district goal. The band director's conduct was solely in furtherance on his own personal objectives and, even if the school administrators were negligent in failing to stop him, it is difficult to understand how those failures rose to the level of a constitutional wrong.

It requires no gift of prophecy to anticipate that, if the decision of the court of appeals is left undisturbed,

litigants will frame their complaints with sufficiently florid allegations to survive a motion to dismiss, embroiling the federal courts in numerous disputes that should have remained in the state court system. It is doubtful that the Framers of the Constitution intended to make every state action, or failure to act, subject to federal court scrutiny merely through the mechanism of clever pleading.

In its first decision, the lower court cited numerous cases and treatises on tort law which allegedly establish the principal that a school district and its administrators should be held liable for the criminal acts of others. In its first decision, the court ruled there was "an adequate basis from the Pennsylvania child abuse reporting and in loco parentis statutes, coupled with the broad

common law duty owed by school officials to students to conclude there was a desire on the part of the state to provide affirmative protection to students." Stoneking v. Bradford Area School Dist., 856 F.2d 594, 603 (3d Cir. 1989). Thus, the court ruled that there was a constitutional duty to protect.

In its latest decision the court "reiterate[d] that the constitutional right Stoneking alleges, to be free from invasion of her personal security through sexual abuse, was well-established at the time the assaults upon her occurred." Stoneking v. Bradford Area School Dist. 882 F.2d 720, 726 (3d Cir. 1989). Again, the court confuses a liberty interest with a fundamental right.

If the liberty interest -- freedom from bodily injury -- is coterminus with a substantive fundamental right, then any

act of, or failure to act by, a public school official that affects a liberty interest of a student, employee or taxpayer is open to scrutiny by the federal courts. The courts could be called upon to determine not only whether the state provided procedural due process, but the court will also decide whether the action itself was correct. Should a school be closed? Should a dress code be instituted? Should the school offer an AIDS education program? Is a ten day suspension for a drug offense too long? Does the district have adequate policies and procedures in place to prevent athletic injuries and other injuries usually redressed under state tort laws.

If state statutes, such as child abuse laws exist, the failure to follow the statute would likely be held by the

lower court to deprive the person of a substantive due process right. Every state in the country has a statute requiring the reporting of child abuse which under the lower court opinion means that the school district is strictly liable under the U.S. Constitution for child abuse committed by anyone who has ever been a school employee no matter when or where the offense takes place - if there is evidence that someone in the school system had notice that the person might have committed such an act in the past.

In the case involving Judy Sowers there was no allegation that the school district had notice of prior acts of child abuse. Thus the mere failure to train is sufficient to give rise to liability.

Where state statutes impose higher

standards of care on certain school employees that, too, could raise the issue of "reckless disregard," where the employee fails to meet the higher standards. See Estate of Lindburg v. Mount Pleasant I.S.D., 746 S.W.2d 257 (Tex. Ct. App. 1987) (higher standard of care for school bus drivers); rev'd on ground of immunity 766 S.W.2d 208 (Tex. 1989).

In a survey conducted in the summer of 1989, NASSP attempted to determine the degree to which litigation and the threat of it affected the conduct of school principals in its membership. A random sample of the membership was selected and a statistically valid number of questionnnaires (just over 29%) were returned.

Only 9% of those responding had been involved in any school-related litigation

in the previous two years. Nevertheless, 58% of these same respondents reported that the threat of litigation and reports of high insurance company settlements had caused changes in school-related programs in their schools during this period. This would suggest the very wide "ripple effect" produced by the expanding number and scope of suits against school administrators and school districts -- even where such suits have not directly involved specific administrators.

While the 190 respondents to the survey reported the termination of only 16 curricular programs, they reported the modification of 246 others, about half of them because of lawsuits threatened or initiated. In addition nearly 51 extra-curricular programs were terminated, and another 301 were reportedly modified. All tolled, nearly

every other administrator responding to the survey had terminated a program, and nearly three more were modified by each respondent. When projected across the entire educational landscape of the country this represents an enormous curtailment of educational opportunity as the result of actual or feared litigation.

One could argue, of course, that the curtailment of school programs as a result of feared litigation represents only legitimate concern for the safety of students or others in the school community, and to the extent that it is caused by increased or novel litigation, that litigation is a positive and desirable thing. In order to evaluate that argument, it is necessary, however, to examine the kinds and quantity of programs actually curtailed.

Fortunately, this information was also sought in the survey.

Of the 614 curricular and extra-curricular programs reported as being terminated or modified the largest group, nearly one-third, involved athletics or cheerleading. Another 20% concerned classroom trips, vocational shop classes, and science labs, and more than 10% involved the use of volunteers in fundraising and other capacities on behalf of the school. It is difficult to argue that all of these activities were so hazardous as to warrant their elimination or modification. Yet that is exactly the effect flowing from the kind of imaginative litigation reflected in the case now before this Court. It is not difficult to imagine that the subjection of school districts, school board members and administrators to

liability for the kind of injury alleged herein will only lead those administrators and board members to eliminate any individualized instruction programs such as the kind giving rise to the claims presented here.

Indeed, the only other course of action open to school districts and their administrators would be the kind of action against teachers accused of sexual abuse which would undoubtedly trigger litigation or other threatened action by the teachers involved or their organizational representatives against school districts, administrators and board members whom they regarded as depriving them of their constitutional rights.

Unless the Supreme Court recognizes the effects implicit in the case before it, school districts, their boards and

administrators will be placed in a no-win situation -- and the real losers will be the millions of students whose educational opportunities will be foregone in the interest of the attenuated rights allegedly infringed by the Petitioners in the case at bar.

V. Conclusion

It does not appear that any useful purpose will be served by waiting until a trial of the facts in this case to pursue the issue of whether a "special relationship" exists between schools and students. The case cannot be tried below without an implicit assumption that the relationship exists.

By basing its decision on "reckless disregard" and "deliberate indifference" of the school officials to what it erroneously characterized as a "clearly established" fundamental constitutional

right, the court of appeals simply reaffirmed its earlier holding that a special relationship does exist between a school and its students which constitutionally obligates the school district to protect students from bodily harm. In other words, it implicitly assumes, without any analysis, that this Court's ruling in DeShaney does not apply in the school context. By so doing, the court of appeals has simply added to the confusion experienced by school districts and their officials regarding their constitutional duty, if any, to protect students from bodily harm.

For these reasons, Amici respectfully urge this Court to grant the writ of certiorari in this case to resolve this issue or at the very least to vacate the decision of the Third Circuit Court of Appeals and reverse with

instructions to rule expressly on the applicability of DeShaney to the school context.

Respectfully submitted,

Gwendolyn H. Gregory
Counsel of Record
Deputy General Counsel
National School Boards Association
1680 Duke Street
Alexandria, VA 22314
(703) 838-6722

August W. Steinhilber
NSBA General Counsel

Thomas A. Shannon
NSBA Executive Director

Ivan B. Gluckman
General Counsel
National Association of Secondary
School Principals
1904 Association Drive
Reston, VA 22091
(703) 860-0200